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2012]

RAISE YOUR GLASS: THE THIRD CIRCUIT HOLDS NEW JERSEY WINE LAWS IN VIOLATION OF THE DORMANT COMMERCE CLAUSE AND LEAVES ROOM FOR A FUTURE CHALLENGE OF THE DIRECT SHIPMENT BAN

JAMES J. WILLIAMSON II*

"By making this wine vine known to the public, I have rendered my country as great a service as if I had enabled it to pay back the national debt."[1]

I. INTRODUCTION

By the end of an introductory course in constitutional law, any law student *should* be able to explain the importance of the Commerce Clause.[2] Far and away, this is the authority by which Congress legislates.[3] Unlike the other enumerated powers, however, the Commerce Clause is

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1. This quote is often attributed to Thomas Jefferson. However, according to the Thomas Jefferson Foundation, the quote has never been found in Jefferson's writings, and it is believed that the statement was in fact made by John Adlum, a friend of Jefferson's. *See Making This Wine Vine Known to the Public (Quotation)*, posting under *Spurious Quotations*, MONTICELLO, http://www.monticello.org/site/jefferson/making-wine-vine-known-to-public-quotation (noting Adlum's statement was actually: "'In bringing this grape into public notice, I have rendered my country a greater service, than I would have done, had I paid the national debt'" (citation omitted)).

2. *See, e.g.*, Edward Rubin, *Curricular Stress*, 60 J. LEGAL EDUC. 110, 111 (2010) (stating that constitutional law is usually taught in first year of law school, and covers structural issues such as separation of powers, federalism, and Commerce Clause).

3. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 256 (3d ed. 2006) (noting that between 1937 and 1995, Supreme Court did not hold congressional laws in violation of Commerce Clause). In 1995, however, the Supreme Court, in *United States v. Lopez*, began a process of restricting the scope of the Commerce Clause by striking down a federal law prohibiting the carrying of a firearm near school property. *See* United States v. Lopez, 514 U.S. 549 (1995) (holding federal firearm ban within 1000 feet of school property in violation of Commerce Clause); *see also* United States v. Morrison, 529 U.S. 598, 613 (2000) (declaring portion of Violence Against Women Act unconstitutional because gender-related crimes did not constitute "economic activity," and therefore did not affect interstate commerce).

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equally as powerful in its "negative" or "dormant" state.[4] Although not expressly stated in the text, the reverse of the Constitution's Commerce Clause prevents states from engaging in economic protectionism.[5] Though this principle is well understood, there remains tremendous confusion among states and courts alike over the regulation of one particular good: alcohol.[6]

Since the ratification of the Twenty-first Amendment in 1933, alcohol law has been in a state of flux.[7] For over eighty years, states and federal

4. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571 (1997) ("[T]he Commerce Clause [has] not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but [ ] it also [has] immediately effected a curtailment of state power."). In his dissent, Justice Thomas notes that although both "negative" and "dormant" have been used to describe this doctrine, he prefers "negative" for two reasons. *See id.* at 609 n.1 (Thomas, J., dissenting) (explaining preference for "negative Commerce Clause"). First, "'[T]he "negative Commerce Clause" . . . is "negative" not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution.'" *Id.* (quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring in the judgment)). Second, Justice Thomas believes "[t]here is, quite frankly, nothing 'dormant' about [the Court's] jurisprudence in this area." *Id.* (citation omitted).

5. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (discussing reason for dormant Commerce Clause). In the opinion of the Court, Justice Jackson summarized the reason for the dormant Commerce Clause doctrine:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id.; *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705 (1984) ("[T]he dormant commerce clause is aimed primarily at measures taken out of a desire to improve the economic position of in-staters at the expense of out-of-staters."). In the following paragraph of his article, Professor Sunstein explains that the doctrine is aimed at prohibiting state protectionism under the theory that out-of-staters do not have political recourse to address the discrimination because they are not citizens of the discriminating state. *See id.* (explaining reasons for dormant Commerce Clause). When regulations burden equally, however, "the political safeguard is more reliable." *Id.*

6. *See* Stuart Banner, Granholm v. Heald*: A Case of Wine and a Prohibition Hangover*, 2005 CATO SUP. CT. REV. 263, 263 (2005) (citing reason for plethora of dormant Commerce Clause challenges due to Twenty-first Amendment). Professor Banner credits the Twenty-first Amendment, and its grant of power to the states to regulate interstate shipments of alcohol, as the reason for the constant amount of alcohol litigation. *See id.* (proffering reason for dormant Commerce Clause challenges).

7. *See id.* ("Because states have been aggressive in regulating the liquor business over the past seventy years, and because lots of money has been at stake, courts, including the Supreme Court, have been wrestling with the Twenty-first Amendment ever since the end of Prohibition."); *see also* Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-first Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 914-18 (2005) (providing history of Eighteenth

courts have struggled to determine how Section Two of the Twenty-first Amendment—which provides states with the authority to regulate the shipment of alcohol—interacts with the dormant Commerce Clause.[8] Throughout this period, courts, rather than harmonizing the dueling provisions, have simply chosen between them: showing favor for either (1) the more recently ratified Twenty-first Amendment and states' rights or (2) a doctrine developed against the backdrop of "Balkanization" that led to the demise of the Articles of Confederation and ultimately to the drafting of our Constitution.[9] Not an easy choice.

The Supreme Court did its best to bring these two warring constitutional provisions into harmony in *Granholm v. Heald*.[10] *Granholm* involved challenges to the constitutionality of Michigan and New York alcohol laws.[11] While these laws permitted in-state wineries to sell directly to consumers, they prevented out-of-state wineries from doing the same.[12] The Supreme Court not only held that the state laws violated the dormant Commerce Clause, but further stated that the laws could not be saved by

Amendment, from beginning of "Noble Experiment" to its repeal via ratification of Twenty-first Amendment).

8. *See* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

9. *See* James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 279 (2007) (discussing reason for adopting dormant Commerce Clause doctrine: to avoid pitting states against each other, which had occurred among colonies, and eventually led to end of Articles of Confederation). Mr. Tanford, in addition to authoring an interesting article about the current battle over wine and e-commerce, which is at the center of the direct shipment ban debate, was also Counsel of Record for the plaintiffs in *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court case that provided the precedent upon which the Third Circuit relied when deciding the case upon which this Casebrief is written. *See id.* at n.a1 (describing Mr. Tanford's background).

10. 544 U.S. 460, 466 (2005) ("We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.").

11. *See id.* at 465 (stating case involved challenge to Michigan and New York laws).

12. *See id.* at 465-66 (describing in general terms issue before Court). There were slight differences between the Michigan direct shipment law and the New York regulatory scheme. *See id.* at 466 (noting differences in "details and mechanics of the two regulatory schemes"). Both Michigan and New York used the "three-tier" regulatory system, which forces alcohol producers (in this case, the wineries) to sell to wholesalers, who in turn sell to retailers, who finally sell the wine to consumers. *See id.* at 466-67 (describing how three-tier regulatory system operates). Michigan allowed in-state wineries to ship directly to consumers as long as the winery possessed a "wine maker" license, a benefit that was not extended to out-of-state wineries. *See id.* at 469 (explaining how Michigan law discriminated against out-of-state wineries). New York, on the other hand, allowed out-of-state wineries to "ship directly to New York consumers only if it [became] a licensed New York winery, which requires the establishment of 'a branch factory, office or storeroom within the state of New York.'" *Id.* at 470 (quoting N.Y. ALCO. BEV. CONT. LAW § 3(37), *invalidated by Granholm*, 544 U.S. 460).

the Twenty-first Amendment.[13] In the opinion, however, the Court affirmed (arguably through dicta) that the alcohol regulatory scheme employed by a majority of the states—the "three-tier" regulatory system—remained "unquestionably legitimate" under the Twenty-first Amendment.[14] It is over this language that the majority of battles between the dormant Commerce Clause and state regulation of wine continue to be waged.[15]

Since *Granholm*, nearly every circuit court has issued a ruling applying the Court's holding, with varying degrees of deference.[16] In December 2010, the United States Court of Appeals for the Third Circuit finally weighed in, and issued an opinion in *Freeman v. Corzine*[17] that struck down certain New Jersey wine laws as unconstitutional.[18] The New Jersey laws allowed in-state wineries to sell directly to consumers and retailers, but prohibited out-of-state wineries from enjoying the same benefit.[19] Not only did the Third Circuit find those laws in violation of the dormant Commerce Clause, but it also extended its holding to the importation and

13. *See id.* at 493 ("States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers.").

14. *Id.* at 489 ("We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990))). As discussed in the text, there is debate as to whether the Court's acknowledgement of the three-tier system in *North Dakota*, and subsequently *Granholm*, was dicta or part of the holding. *See* Banner, *supra* note 6, at 285 (stating that "unquestionably legitimate" language in *North Dakota* was dicta). *But see* Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 816 (5th Cir. 2010) (noting that "unquestionably legitimate" language may be dicta, but if so, it is "compelling dicta").

15. *See, e.g.*, Angela Logomasini, *Why Is Congress So Afraid of Mail Order Wine?*, FOXNEWS.COM, Sept. 29, 2010, http://www.foxnews.com/opinion/2010/09/29/angela-logomasini-beer-wine-wholesalers-legislation-retailers-wineries/ (noting that congressional proposals to protect state alcohol laws focus on three-tier system).

16. *See, e.g.*, *Steen*, 612 F.3d 809 (holding Texas law that allows in-state alcohol retailers to make local deliveries, but forbids out-of-state retailers from doing same, does not violate dormant Commerce Clause); Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009) (holding New York law that allowed in-state alcohol retailers to ship directly to consumers, but prohibited out-of-state retailers from doing same, was constitutional because all in-state alcohol was still subject to three-tier system); Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008) (holding Kentucky statutory in-person purchase requirements for authorized direct shipping discriminated against interstate commerce in practical effect); Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1st Cir. 2007) (holding that Maine statute that allowed small wineries to bypass wholesalers and sell directly to consumers in face-to-face transactions did not violate dormant Commerce Clause); Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) (holding personal importation regulations do not violate dormant Commerce Clause).

17. 629 F.3d 146 (3d Cir. 2010).

18. *See id.* at 164-65 (holding that direct sales provisions of New Jersey law violate dormant Commerce Clause).

19. *See id.* at 151-52 (discussing alleged discrimination of New Jersey wine laws as claimed by plaintiffs).

reciprocity restrictions, and left the door open for a challenge to New Jersey's direct shipment ban.[20] While this decision not only appears to benefit wine lovers, it is a break from competing circuit court analysis finding such regulations to be lawful.[21]

This Casebrief argues that the Third Circuit's recent treatment of the dormant Commerce Clause with respect to alcohol laws not only is consistent with Supreme Court precedent, but, by reaffirming that the Twenty-first Amendment does not immunize states from economic protectionism, has established an environment that will allow future challenges to outstanding alcohol laws via the dormant Commerce Clause. Part II of this Casebrief discusses how other circuits have treated the dormant Commerce Clause with respect to alcohol laws in the wake of the *Granholm* decision.[22] Part III examines the Third Circuit's opinion in *Freeman*.[23] Part IV analyzes the court's reasoning and identifies areas upon which future litigators should focus in order to challenge or defend forthcoming lawsuits.[24] Furthermore, it discusses why the Third Circuit "bar" can expect plenty of patrons as it becomes the forum of choice for wine law

20. *See id.* (finding importation and reciprocity laws in violation of dormant Commerce Clause). The court, in conducting its analysis on the direct shipment ban, noted that the plaintiffs "d[id] not argue in the alternative that the direct shipping ban fails the balancing test of *Pike v. Bruce Church, Inc.*" *Id.* at 164 (explaining that because no argument was made, court does not need to conduct that analysis). The court also noted that the plaintiffs did not present any evidence that the New Jersey laws directly burdened interstate commerce. *See id.* at 162-63 (noting lack of evidence of impact of state alcohol laws on interstate commerce). Had a *Pike* argument been made, or evidence on how the state laws impacted interstate commerce been presented, the court suggested that perhaps their analysis would have probed a little deeper. *See id.* (suggesting that several types of evidence could have been presented to show direct harm on interstate commerce).

21. *See, e.g.*, *Steen*, 612 F.3d 809 (holding Texas law that allows in-state alcohol retailers to make local deliveries, but forbids out-of-state retailers from doing same, does not violate dormant Commerce Clause); *see also*, Lee Procida, *Court to Decide on N.J. Rules/Changes Worry Wineries*, PRESS OF ATLANTIC CITY, Feb. 5, 2011, at A1 (discussing bill that would allow for direct shipment of wine to N.J. consumers). *But see* Paul Franson, *Judgment Threatens Consumer-Direct Wine Sales*, WINES & VINES (Dec. 22, 2010), http://www.winesandvines.com/template.cfm?section=news&content=82219# (discussing possible ramifications of Freeman v. Corzine decision). In the article, Cary Greene, chief operating officer and general counsel of WineAmerica, speculates that the decision could lead to the closing of New Jersey wine tasting rooms. *See id.* (discussing possibilities for remedy on remand).

22. For a discussion of how other circuits have applied the *Granholm v. Heald* holding, see *infra* notes 31-47 and accompanying text.

23. For a summary of the *Freeman v. Corzine* decision, see *infra* notes 76-119 and accompanying text.

24. For a critical analysis of the *Freeman v. Corzine* decision, see *infra* notes 125-37 and accompanying text. For a discussion as to where future litigation should focus to challenge or defend other state alcohol laws, and the importance behind how the court resolved the prudential standing issue, see *infra* notes 138-53 and accompanying text.

challenges. Finally, Part V closes by addressing the possible remedies that await New Jersey wineries.[25]

II. A COMPLICATED PAIRING: WINE AND THE DORMANT COMMERCE CLAUSE

Following the ratification of the Twenty-first Amendment, courts were left with the arduous task of defining its limits.[26] For years, post-ratification Supreme Court opinions focused mainly on import excise taxes and licensing fees.[27] Thanks to the Internet's explosive impact on the wine market in the late-twentieth century, the Court acknowledged the need to address the wine shipment debate.[28] This Part first discusses the Court's *Granholm* decision.[29] Then, it addresses the treatment of that decision in the hands of the circuit courts.[30]

A. *The Supreme Court and* Granholm

When applying the dormant Commerce Clause to wine law challenges, circuit courts generally rely upon a single Supreme Court case as precedent: *Granholm v. Heald*.[31] *Granholm*, however, is not the only Supreme Court case that serves as relevant authority for wine law discus-

25. For a discussion of the possible remedies upon remand, see *infra* notes 154-57 and accompanying text.

26. *See generally*, Jessica R. Reese, Note, *A Post-*Granholm *Analysis of Iowa's Regulatory Framework for Wine Distribution*, 94 IOWA L. REV. 665, 673-76 (2009) (discussing post Twenty-first Amendment ratification jurisprudence).

27. *See* Banner, *supra* note 6, at 279-82 (discussing post-Twenty-first Amendment ratification Supreme Court decisions).

28. *See* FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3-9 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf (discussing effect of state wine laws on wine commerce via internet). This is the primary factual study upon which the *Granholm* Court relied throughout its opinion. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005) (citing FTC report on wine e-commerce industry); *see also* Desireé C. Slaybaugh, Note, *A Twisted Vine: The Aftermath of* Granholm v. Heald, 17 TEX. WESLEYAN L. REV. 265, 267-69 (2011) (discussing impact of e-commerce on wine industry).

29. For a discussion of the Supreme Court's decision in *Granholm v. Heald*, see *infra* notes 31-47 and accompanying text.

30. For a discussion of the application of the *Granholm* decision by the circuit courts, with examples of how the circuits have held state liquor laws to both survive and fail dormant Commerce Clause challenges, see *infra* notes 48-75 and accompanying text.

31. *See* Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-first Amendment?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 601, 627 (2008) (discussing application of Granholm v. Heald by circuit courts). Interestingly, in their discussion of the *Granholm* decision by lower courts, the authors predict that "[t]he requirement of 'equal access' for out-of-state liquor producers may, when fully developed, outlaw a number of practices initially thought to survive *Granholm*." *See id.* (predicting expansion of *Granholm* holding by lower courts).

sions.[32] *North Dakota v. United States*,[33] a case that involved a Supremacy Clause challenge—not a dormant Commerce Clause challenge—provides the oft-quoted language that the three-tier alcohol regulatory system is "unquestionably legitimate."[34] Lesser known circuit opinions also occasionally appear in court decisions; still, *Granholm* remains the primary authority upon which lower courts rely, due to its treatment of the dormant Commerce Clause with respect to three-tier alcohol regulatory systems.[35]

The majority of states employ a three-tier system for regulating and accounting for the sale of alcohol.[36] Under such a system, alcohol pro-

32. *See generally* Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609, 639-45 (2005) (discussing Supreme Court precedent of dormant Commerce Clause and alcohol laws post-Prohibition).

In their discussion of Supreme Court precedent following the repeal of the Eighteenth Amendment, the authors note that early opinions did uphold facially discriminatory state liquor laws. *See id.* at 640 (discussing early decisions, all based upon reasoning set forth in first among such cases: Bd. of Equalization of California v. Young's Mkt. Co., 299 U.S. 59 (1936)). Those early opinions, however, have very little precedential value as subsequent Supreme Court opinions have rejected those holdings. *See id.* (citing United States v. Frankfort Distilleries, 324 U.S. 293 (1945), for upholding federal liquor laws and rejecting argument that Twenty-first Amendment gave states complete control over liquor). In 1984, the Supreme Court decided *Bacchus Imports, Ltd. v. Dias*, which applied "standard Commerce Clause principles to discriminatory regulation of alcohol" to find Hawaii liquor laws in violation of the dormant Commerce Clause. *Id.* at 641 (referring to Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-76 (1984)). The Court then affirmed its dormant Commerce Clause analysis in *Healy v. Beer Institute*, which found a Connecticut law requiring out-of-state beer shippers to assure that their beer prices were not higher than border-state beer prices violated the dormant Commerce Clause. *See id.* at 641-42 (discussing Healy v. Beer Inst., 491 U.S 324 (1989)).

33. 495 U.S. 423 (1990).

34. *See id.* at 426 (plurality opinion) ("The clash between the State's interest in preventing the diversion of liquor and the federal interest in obtaining the lowest possible price forms the basis for the Federal Government's Supremacy Clause and pre-emption challenges to the North Dakota regulations."). In addressing the three-tier system, which North Dakota employed, in relation to the Twenty-first Amendment, Justice Stevens wrote:

> The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.

Id. at 432 (citations omitted) (describing three-tier system as "unquestionably legitimate").

35. *See, e.g.*, Freeman v. Corzine, 629 F.3d 146, 151-52 (3d Cir. 2010) (invoking *Granholm* holding as controlling). For a discussion of the three-tier system, see *infra* notes 36-38 and accompanying text.

36. *See* Christopher G. Sparks, Comment, *Out-of-State Wine Retailers Corked: How the Illinois General Assembly Limits Direct Wine Shipments from Out-of-State Retailers to Illinois Oenophiles and Why the Commerce Clause Will Not Protect Them*, 30 N. ILL. U. L. REV. 481, 486 (2010) (stating that most states moved to three-tier system of regulation after ratification of Twenty-first Amendment). For an interesting discussion of the history of the three-tier system, see Tanford, *supra* note 9, at 302-03 (discussing purpose and history behind three-tier regulatory system).

ducers sell to wholesalers, who in turn sell to retailers, who finally sell to consumers.[37] This system violates the dormant Commerce Clause when in-state entities are afforded opportunities to bypass some or all of this three-tier system (i.e., avoiding a wholesaler), but out-of-state entities are not.[38]

This was precisely the issue in *Granholm*.[39] In *Granholm*, the Supreme Court addressed the question of whether a regulatory scheme that permitted in-state wineries (producers) to ship directly to consumers, but restricted the ability of out-of-state wineries to do the same, violated the dormant Commerce Clause.[40] The Court held the scheme unconstitutional.[41] The Court reiterated its position that the Twenty-first Amendment gave states a great amount of power to regulate the sale of alcohol, but emphasized that such power "does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[42] The Court proclaimed that if a state chose to allow an in-state winery to ship wine directly to a customer, then out-of-state wineries must be afforded the same leniency.[43] A regulation allowing otherwise would run directly against the dormant Commerce Clause because it "'benefits the former and burdens the latter.'"[44]

37. *See* Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 187 (2d Cir. 2009) (describing three-tier system). The court in *Arnold's Wines* states that the purpose of the three-tier system "was to preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry." *Id.*; *see also* Sparks, *supra* note 36, at 486 (describing three-tier regulatory process). Within the three-tier regulatory system it is generally prohibited for an entity to hold more than one position in the hierarchy—something known as "vertical integration." *See* Sparks, *supra* note 36, at 486 (discussing prohibition on vertical integration).

38. *See* Tanford, *supra* note 9, at 320 (discussing *Granholm* holding that prohibited states from discriminating against out-of-state wineries).

39. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005) ("[T]he object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint.").

40. *See id.* at 471 (posing issue before Court). The Supreme Court's direct view of the issue was: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?" *Id.* at 471 (internal quotation marks omitted).

41. *See id.* at 466 ("We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment." (citation omitted)).

42. *See id.* at 493 (discussing why Michigan and New York laws were found to have violated dormant Commerce Clause).

43. *See id.* ("If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.").

44. *Id.* at 472 (quoting Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

Although the states involved (New York and Michigan) made arguments supporting their laws—namely, to curb underage drinking and account for tax revenues—the Court found them largely speculative and unpersuasive.[45] The Court determined that it would uphold state regulations that discriminate against interstate commerce "only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable."[46] Otherwise, such regulations are viewed as per se invalid because they contribute to the exact environment that the Framers wished to avoid through the Commerce Clause: economic Balkanization.[47]

B. Granholm *in the Hands of the Circuit Courts*

In the wake of the *Granholm* decision, many states immediately changed their alcohol laws to avoid legal challenges.[48] Given the choice between extending benefits enjoyed by in-state wineries to out-of-state wineries, or limiting the benefits of both entities, the states with discriminatory laws unanimously chose to extend benefits to their out-of-state counterparts.[49] Because *Granholm*'s holding technically applied only to "producers," leaving two of the three tiers untouched (wholesalers and retailers), states quickly carved out new benefits that extended only to in-state wholesalers or retailers.[50] Over the past five years, the question of

45. *See Granholm*, 544 U.S. at 489-93 (finding states' arguments for discrimination in interstate commerce unpersuasive). The states made two primary arguments for the discriminatory laws: first, the laws allowed the states to police underage drinking; second, the laws facilitated tax collection. *See id.* at 489 (noting states' arguments). The Court found that the evidence the states presented did not show that direct shipping increased alcohol consumption by minors. *See id.* at 490 (noting that lack of evidence left only unsupported assertions). Furthermore, the Court found that the states' tax concerns could be "achieved without discriminating against interstate commerce" through the employment of other nondiscriminatory means, as suggested through the Model Direct Shipping Bill. *Id.* at 491 (noting other regulatory schemes available for tax collection purposes).

46. *Id.* at 493 (citation omitted) (describing conditions needed to allow laws that discriminate against interstate commerce).

47. *See id.* at 476 (acknowledging presumption of invalidity for laws that discriminate against interstate commerce (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978))); *see also id.* at 472 (noting that Framers called Constitutional Convention to address issue of economic Balkanization between colonies).

48. *See* Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-*Granholm *Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 505 (2008) (discussing reaction of states with respect to discriminatory laws following *Granholm*).

49. *See id.* ("After the *Granholm* decision, states with discriminatory laws on their books had to make a choice: they could either 'level up' by extending direct-shipping privileges to out-of-state wineries, or 'level down' by revoking such privileges from in-state wineries.").

50. *See id.* (discussing new restrictions placed on out-of-state entities by states); *see also id.* at 521 ("Defendants [of the Twenty-first Amendment] have further argued that *Granholm* applies only to regulations pertaining to wine producers and products—not to regulations that pertain to wholesalers and retailers.").

how far the *Granholm* holding extends has been left to the circuit courts, with no clear answer emerging.[51]

1. *A Glass Half Full: Circuit Court Decisions Upholding a Dormant Commerce Clause Challenge*

The Sixth Circuit, in *Cherry Hill Vineyards, LLC v. Lilly*,[52] faced the question of whether Kentucky statutes that allowed wineries to ship directly to customers, so long as the customers physically made the purchase at the winery (the "in-person purchase requirement"), offended the dormant Commerce Clause.[53] Although the in-person purchase requirement was not facially discriminatory—out-of-state wineries were afforded the same opportunity for direct shipment as long as the wine was purchased at the out-of-state premises—the court held that the statute discriminated in practical effect.[54] The requirement that wine be purchased from the physical premises of the winery favored Kentucky wineries because of the shorter travel times experienced by in-state customers.[55] It also burdened out-of-state wineries by forcing them to sell their product through wholesalers, which increased the cost of the wine, making it less attainable for the consumer.[56] Because the state failed to show how the law advanced a legitimate local purpose that could not be achieved through other nondis-

51. *See* Banner, *supra* note 6, at 285 (discussing range of possible lawsuits that would arise after *Granholm* decision). Although the author wrote the article in the immediate aftermath of *Granholm*, the author forecasted what the courts could expect by stating:

> We should thus in the short run expect to see challenges brought by out-of-state wholesalers seeking to sell to in-state retailers and consumers, by out-of-state retailers seeking to sell to in-state consumers, by in-state retailers seeking to buy directly from out-of-state producers, and from consumers seeking to buy from anyone, anywhere.

Id. As this Casebrief will show, Professor Banner correctly forecasted the legal storm that followed *Granholm*.

52. 553 F.3d 423 (6th Cir. 2008).

53. *See id.* at 432 ("[T]he threshold question is whether the in-person purchase requirements of KRS §§ 243.155 and 244.165 are discriminatory.").

54. *See id.* at 433 (concluding that plaintiffs proved statute discriminated in practical effect). The court points out that even if a statute does not facially discriminate against interstate commerce, it may still be found to discriminate in practical effect. *See id.* (providing that statutes may discriminate against interstate commerce even if facially neutral). For a court to hold a statute as discriminatory in practical effect, it must be shown "'both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.'" *Id.* (quoting E. Ky. Res. v. Fiscal Court of Magoffin Cnty., 127 F.3d 532, 543 (6th Cir. 1997)).

55. *See id.* at 433 ("[S]mall Kentucky wineries benefit from less competition from out-of-state wineries, especially from wineries in states such as Oregon, which are located a great distance from Kentucky . . . .").

56. *See id.* (discussing effect on cost by funneling wine through wholesaler).

criminatory means, the laws were deemed unconstitutional in violation of the dormant Commerce Clause.[57]

Following the *Lilly* decision, the First Circuit, in *Family Winemakers of California v. Jenkins*,[58] held a Massachusetts law in violation of the dormant Commerce Clause because it allowed "small wineries"—a term that subsumed all Massachusetts wineries—to ship directly to customers, but prohibited "large wineries" from doing the same.[59] Like the court in *Lilly*, the First Circuit found that the law discriminated in its practical effect.[60] The court determined that the law violated the dormant Commerce Clause because it "change[d] the competitive balance between in-state and out-of-state wineries" in a way that benefited the former and burdened the latter.[61] Furthermore, the court dismissed an argument that the law was constitutional because of the Twenty-first Amendment, noting that the amendment does not protect "facially neutral but discriminatory" alcohol laws.[62]

2. *A Glass Half Empty: Using "Unquestionably Legitimate" Reasoning to Ward Off the Commerce Clause*

Not all circuit courts have been willing to extend their dormant Commerce Clause analysis as far as some wine law challengers would like.[63]

57. *See id.* at 434 ("[W]e conclude that Kentucky's in-person purchase requirement, which is discriminatory in practical effect, violates the dormant Commerce Clause."). The state did make arguments that the laws were necessary to limit underage drinking and account for tax revenue, similar to the arguments made in *Granholm*. *See id.* at 434 (arguing why laws are necessary to advance legitimate local purpose). The court, like the Supreme Court did, found them unpersuasive. *See id.* (noting that arguments by state and wholesalers were unpersuasive).

58. 592 F.3d 1 (1st Cir. 2010).

59. *See id.* at 4-5 (discussing issue before court and holding it in violation of Commerce Clause).

60. *See id.* at 12 ("The ultimate effect of [the law] is to artificially limit the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors."). The court offers a good summation of what makes a law discriminatory in its effect by stating, "A state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Id.* at 10 (citations omitted) (describing effectual discrimination).

61. *Id.* at 5 (describing circumstances law created that made it unconstitutional).

62. *Id.* (stating that Twenty-first Amendment does not save discriminatory state alcohol laws from unconstitutionality).

63. *See, e.g.*, Black Star Farms LLC v. Oliver, 600 F.3d 1225 (9th Cir. 2010) (holding small winery and in-person purchase exceptions to three-tier system did not violate dormant Commerce Clause); Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008) (holding ban on direct shipment of alcohol to consumers did not violate dormant Commerce Clause); Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1st Cir. 2007) (finding Maine statute that allowed in-state wineries to bypass wholesalers and sell directly to consumers in face-to-face transactions, but which prohibited direct shipping, did not violate dormant Commerce Clause).

For instance, the Fourth Circuit, in *Brooks v. Vassar*,[64] ruled that a Virginia law providing for a personal import exception, which limited the amount of alcohol a person could bring into the state to one gallon, did not violate the dormant Commerce Clause.[65] The court's analysis focused on the law's treatment of the three-tier system.[66] Because Virginia wanted to ensure that all alcohol passed through its "unquestionably legitimate" three-tier system, the court determined that the law was not only nondiscriminatory, but in fact favored out-of-state alcohol because it allowed one gallon of imported wine to skirt the three-tier system.[67] Other circuit courts have upheld similar laws in the face of a Commerce Clause challenge through parallel reasoning.[68]

The most recent, and perhaps most significant circuit court decision with respect to *Freeman v. Corzine*, is the Fifth Circuit's decision in *Wine*

64. 462 F.3d 341 (4th Cir. 2006).

65. *See id.* at 344-45 (summarizing court's holding).

66. *See id.* at 352 ("[A]n argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself.").

67. *See id.* (noting that importation restriction allows out-of-state alcohol to circumvent three-tier system, and thus is not discriminatory); *see also* Rotter & Stambaugh, *supra* note 31, at 628-30 (commenting on court's analysis in *Vassar*). The article provides a lengthy analysis of the dissenting opinion in *Vassar*, noting that under the dissent's interpretation of *Granholm*, the law would have violated the dormant Commerce Clause. *See id.* at 630 (noting that dissent would not have found law to advance legitimate local purpose).

68. *See, e.g.*, Arnold's Wine, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009) (holding New York statute prohibiting out-of-state retailers from shipping directly to consumers as constitutional).

The statute at issue in *Arnold's Wines* allowed in-state retailers to deliver alcohol directly to consumers, but prohibited out-of-state retailers from doing the same. *See id.* at 188 ("It is this distinction—that New York-licensed retailers, but not out-of-state retailers, may deliver liquor directly to New York residents—that Appellants challenge in this case."). The court found that the law was not discriminatory because, under the "unquestionably legitimate" three-tier system, all alcohol, whether in- or out-of-state, was required to pass through New York's regulatory scheme. *See id.* at 191 ("New York's ABC Law treats in-state and out-of-state liquor evenhandedly under the state's three-tier system, and thus complies with *Granholm*'s nondiscrimination principle." (citation omitted)); *see also* Sparks, *supra* note 36, at 496 (discussing Second Circuit's reliance on "unquestionably legitimate" three-tier regulatory system).

Because New York treated all alcohol equally, the court held the law to be constitutional. *See Arnold's Wines*, 571 F.3d at 186 (holding challenged statute as constitutional as long as all liquor sold passes through three-tier system). Therefore, the Second Circuit found it unnecessary to analyze the law under the dormant Commerce Clause. *See id.* at 191 ("Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce Clause principles."). *But see* Andre Nance, Note, *Don't Put a Cork in* Granholm v. Heald*: New York's Ban on Interstate Direct Shipments of Wine is Unconstitutional*, 16 J.L. & POL'Y 925, 933 (2008) (arguing against Second Circuit's holding in *Arnold's Wine*).

Country Gift Baskets.com v. Steen.[69] In *Steen*, the Fifth Circuit held a Texas law that allowed in-state retailers to make local deliveries to customers, but prevented out-of-state retailers from shipping directly to Texas consumers, did not violate the dormant Commerce Clause.[70] The court, like the Second and Sixth Circuits, began its discussion by acknowledging that the three-tier system is "unquestionably legitimate."[71] The court then determined that the *Granholm* decision was limited solely to *producers*, and that Texas "has not tripped over that bar by allowing in-state *retailer* deliveries."[72] Although the court acknowledged that the dormant Commerce Clause applied, it stated that it applied differently to alcohol due to the Twenty-first Amendment.[73] Finding the local deliveries to be a "constitutionally benign incident of an acceptable three-tier system," the court ruled in favor of the state's scheme.[74]

The Fifth Circuit's decision followed a string of circuit cases that also relied on the "unquestionably legitimate" reasoning. For that reason, along with proposed congressional legislation that would grant greater authority to states in the regulation of interstate alcohol, it appeared wine

69. 612 F.3d 809 (2010), *cert. denied*, 131 S. Ct. 1602 (2011).

70. *See Steen*, 612 F.3d at 811 ("We hold that the statutes do not run afoul of the dormant Commerce Clause.").

71. *See id.* at 818-19 (noting that *Granholm* and *North Dakota* found three-tier system to be "unquestionably legitimate"). The court, in direct language, emphasizes this importance by stating: "[T]he foundation on which we build is that Texas may have a three-tier system." *Id.* at 819 (noting three-tier acceptability as starting point for analysis). A major criticism of the petitioners, in their petition for writ of certiorari, is that the Fifth Circuit (as well as the Second Circuit in *Arnold's Wines*) began and ended its analysis with the aforementioned proposition, instead of analyzing the case under the dormant Commerce Clause. *See* Petition for Writ of Certiorari at 2, *Steen*, 131 S. Ct. 1602 (No. 10-671), 2010 WL 4735983 ("Rather than construing *Granholm* as a *prohibition of* discrimination, these courts have interpreted that decision as a *license for* discrimination."). Similarly, an amici brief filed in support of the petitioners argued that the Fifth Circuit's decision was incorrect because, according to *Granholm*, a court can consider whether a regulation is saved by the Twenty-first Amendment only after it has applied its dormant Commerce Clause analysis. *See* Brief for Economists, Law and Economics Scholars, and Former FTC Officials as Amici Curiae in Support of Petitioners at 9, *Steen*, 131 S. Ct. 1602 (No. 10-671), 2010 WL 5388434 ("The Fifth Circuit erred in reading *Granholm* as endorsing all three-tier systems as 'unquestionably legitimate,' even those that discriminate against out-of-state shippers.").

72. *See Steen*, 612 F.3d at 820 (announcing narrow reading of *Granholm* as only applicable to producers (wineries)).

73. *See id.* at 820 ("The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment."). *But see* Petition for Writ of Certiorari, *supra* note 71, at 11-12 ("But the court did not apply the Commerce Clause 'differently' in this case; it did not apply the Commerce Clause *at all*.").

74. *See* Petition for Writ of Certiorari, *supra* note 71, at 11 (determining Texas's allowance for in-state local deliveries as constitutional).

enthusiasts had no reason to celebrate.[75] And then came *Freeman v. Corzine.*[76]

III. THE THIRD CIRCUIT BELLIES UP TO THE BAR IN *Freeman v. Corzine*

In the wake of *Granholm* and its circuit court progeny, the Third Circuit finally broke its silence on wine laws and issued the *Freeman* opinion in December 2010.[77] First, this Part tracks the path of *Freeman* through the Third Circuit.[78] Second, it provides a brief background of the parties and the merits of the case.[79] Finally, it concludes with a discussion of the Third Circuit's ruling on each of the five issues presented.[80]

A. *Allowing* Granholm *to Ferment:* Freeman*'s Delay in Going to Court*

As twisted as a grape vine was *Freeman*'s path in arriving to the Third Circuit. The case was originally filed as *Freeman v. Fischer*[81] in the Federal District of New Jersey in 2003.[82] The district court, however, administratively terminated the case in light of the Supreme Court's acceptance of *Granholm v. Heald.*[83] The court left available the possibility to reopen the case at a later date, should the plaintiffs not be satisfied with the result in *Granholm.*[84] Although *Granholm* addressed some of the plaintiffs' original complaints, it did not address all of their grievances.[85] Specifically, the plaintiffs wished to challenge New Jersey's importation restrictions, reciprocity laws, direct shipment ban of wine, and the statutory winery-retailer

75. *See* Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010, H.R. 5034, 111th Cong. (2010) (proposing legislation that would give greater rights to states to regulate alcohol, and would significantly diminish role of dormant Commerce Clause in alcohol law challenges).

76. For a discussion of *Freeman v. Corzine,* see *infra* notes 77-120 and accompanying text.

77. *See* Freeman v. Corzine, 629 F.3d 146 (3d Cir. 2010) (holding all New Jersey wine laws at issue, except for direct-shipping regulations, unconstitutional).

78. For a brief discussion on how *Freeman* made its way to the Third Circuit, see *infra* notes 80-88 and accompanying text.

79. For a background discussion of *Freeman v. Corzine,* see *infra* notes 89-98 and accompanying text.

80. For a summary of how the Third Circuit ruled on the issues facing the court in *Freeman v. Corzine,* see *infra* notes 99-119 and accompanying text.

81. 563 F. Supp. 2d 493 (D.N.J. 2008), *aff'd in part, vacated in part, rev'd in part sub nom.*, Freeman v. Corzine, 629 F.3d 146 (3d Cir. 2010).

82. *See* Erin McAuley, *New Jersey Liquor Laws May Be Unconstitutional,* COURTHOUSE NEWS SERV., Dec. 22, 2010, http://www.courthousenews.com/2010/12/22/32828.htm (noting that plaintiffs originally filed suit in 2003).

83. *See Fischer,* 563 F. Supp. 2d at 497 (noting that district court administratively terminated original complaint, with leave to reopen proceedings, because Supreme Court granted certiorari in *Granholm*).

84. *See id.* ("The Court administratively terminated the matter subject to the parties' right to move to reopen the proceedings . . . .").

85. *See id.* at 496 (stating that plaintiffs specifically wished to challenge in-state winery licensing structure that persisted after *Granholm*).

laws that favored in-state wineries.[86] Therefore, the court granted the plaintiffs' request to reopen the case.[87] In June 2008, the district court issued an opinion that ruled in favor of the defendants on most, but not all, of the issues.[88] Dissatisfied with the ruling, both sides appealed to the Third Circuit.[89]

B. *Factual Background of* Freeman v. Corzine

Freeman v. Corzine involved a suit brought under 42 U.S.C. § 1983 by two New Jersey oenophiles who challenged several New Jersey statutes that limited their accessibility to different out-of-state wines.[90] Three New Jersey alcohol wholesalers joined the named defendant, New Jersey's Director of Alcoholic Beverage Control, who claimed that the challenged laws were indisputably constitutional.[91] The court addressed six issues on appeal.[92] The first issue involved a justiciability question: whether the plaintiffs had standing to sue.[93] The court determined they did.[94] The next five issues challenged the New Jersey regulations—the first two of

86. *See id.* at 499-500 (listing five issues plaintiffs identified with New Jersey wine law that violated dormant Commerce Clause).

87. *See id.* at 497 (acknowledging that court granted request to reopen case).

88. *See id.* at 507 ("The Court concludes that *only* the licensing fee schedule for out-of-state businesses . . . and the salesroom provision . . . offend the dormant commerce clause." (emphasis added)).

89. *See* Freeman v. Corzine, 629 F.3d 146, 152-53 (3d Cir. 2010) (noting that although district court found challenged provisions to be mostly constitutional, both parties appealed to circuit court).

90. *See id.* at 151 (summarizing parties involved and issues at bar in case). There were two other groups of plaintiffs who joined in the case: a California winery and a couple who sought greater access to Kosher wines. *See id.* (mentioning other plaintiffs in case). However, because the court ends its standing analysis with the Freemans, they serve as the principal party on the plaintiff side. *See id.* at 157 ("[H]aving concluded that the Freemans possess both constitutional and prudential standing to raise all of the claims at issue, we do not consider the standing of the other plaintiffs.").

91. *See id.* at 151-53 (noting New Jersey's Director of Alcoholic Beverage Control as defendant, along with intervening wholesalers). It is not peculiar that the wholesalers intervened in this case, given their interest in remaining within the middle-tier of the three-tier system because of the amount of revenue derived from that position. *See* Robert Taylor & Ben O'Donnell, *Battle over Direct Shipping Heats Up*, WINE SPECTATOR, Aug. 31, 2010, at 19, *available at* http://www.freethegrapes.com/sites/default/files/080110_Wine_Spectator%20-_Battle_Over_Direct_Shipping_Heats_Up.pdf (noting amount of political contributions Wine and Spirits Wholesalers of America, political action committee of wine wholesalers, has given to members of Congress to support proposed legislation that would support wholesaler role in alcohol distribution).

92. *See Freeman*, 629 F.3d at 151-53 (noting standing and statutory issues before court).

93. *See id.* at 154-57 (addressing "standing" issue). For a discussion of why the court's treatment of the standing issue will make the Third Circuit a more appealable forum for future alcohol law challenges, see *infra* notes 138-41 and accompanying text.

94. *See Freeman*, 629 F.3d at 157 (determining that plaintiffs possess constitutional and prudential standing). For a discussion of how the court determined

which allowed in-state, but not out-of-state, wineries to sell their wines at retail to customers.[95] The third and fourth issues addressed New Jersey's reciprocity and personal importation provisions.[96] The final issue challenged New Jersey's prohibition on the direct shipment of alcohol.[97] The plaintiffs thematically argued that all of the aforementioned restrictions violated the dormant Commerce Clause by favoring in-state wineries over their out-of-state counterparts.[98] Conversely, the defendants argued that the New Jersey laws were not discriminatory because they even-handedly treated in- and out-of-state wineries.[99]

C. *Third Circuit Dormant Commerce Clause Analysis*

The Third Circuit began its analysis of the New Jersey provisions by noting that the Commerce Clause "prohibits a state from impeding free market forces to shield in-state business from out-of-state competition."[100] Applying this rationale, the New Jersey statutes fell in rapid succession.[101] This section first addresses how the court invalidated New Jersey's retail wine provisions.[102] Next, this section examines the court's analysis in striking down the importation and reciprocity laws.[103] Finally, this section studies the Third Circuit's rationale in not striking down the direct shipment ban.[104]

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that the plaintiffs possessed prudential standing, see *infra* notes 138-41 and accompanying text.

95. *See Freeman*, 629 F.3d at 158-60 (conducting analysis of first two statutory provisions allowing in-state wineries to sell at retail to customers, but forbidding out-of-state wineries from doing same).

96. *See id.* at 160-62 (discussing New Jersey's reciprocity provision and personal importation restriction of alcohol).

97. *See id.* at 162-63 (analyzing direct shipment ban challenge brought by plaintiffs).

98. *See id.* at 151-52 (noting plaintiffs' challenge that New Jersey laws infringe dormant Commerce Clause).

99. *See* Brief of Defendant-Appellant/Cross-Appellee Jerry Fischer and Volume One of Joint Appendix at 59, *Freeman*, 629 F.3d 146 (Nos. 08-3268, 08-3302), 2009 WL 7170547 (stating that New Jersey laws treat both in- and out-of-state entities similarly).

100. *Freeman*, 629 F.3d at 157-58 (quoting Granholm v. Heald, 544 U.S. 460, 472 (2005)).

101. *See id.* at 158-62 (invalidating retail wine provisions, along with importation and reciprocity laws).

102. For a discussion of the Third Circuit's analysis in connection with New Jersey's retail wine statute, see *infra* notes 102-07 and accompanying text.

103. For a discussion of the analysis pertaining to the importation and reciprocity provisions, see *infra* notes 109-18 and accompanying text.

104. For an explanation of why the Third Circuit did not strike down New Jersey's direct shipment ban, see *infra* notes 119-23 and accompanying text.

1. *Selling Wine at Retail: A Win for the Dormant Commerce Clause*

The court began its dormant Commerce Clause analysis by addressing two New Jersey statutes focused on the retail sale of wine by wineries.[105] The statutes at issue allowed New Jersey wineries to sell wine to consumers on their premises and in "six salesrooms apart from the winery premises."[106] In-state wineries were also afforded the benefit of selling directly to retailers.[107] The court rejected the defendants' arguments that the statutes were non-discriminatory, declaring that the defendants' purported "equal-handedness" was absent from New Jersey's direct-sales provision.[108] Judge Pollak, writing for the court, had no difficulty finding that the laws were facially discriminatory, as New Jersey allowed in-state wineries to circumvent steps of the three-tier system, whereas out-of-state entities could not.[109] As such, the laws were subject to strict scrutiny analysis and subsequently failed the dormant Commerce Clause analysis due to the economic benefit afforded to in-state wineries.[110]

2. *Personal Importation and Reciprocity Laws: Discrimination Through Limitation*

The court then addressed New Jersey's personal importation and reciprocity provisions.[111] First, the court noted that one of the challenged statutes placed a one-gallon limit on the amount of wine that could be

105. *See Freeman*, 629 F.3d at 158 ("We first consider plaintiffs' challenges to the statutory provisions allowing only in-state wineries to sell directly to retailers and consumers.").

106. N.J. STAT. ANN. § 33:1-10(2a) (West 2008) ("The holder of this license shall also have the right to sell such wine at retail in original packages in six salesrooms apart from the winery premises for consumption on or off the premises and for sampling purposes for consumption on the premises . . . ."), *invalidated by Freeman*, 629 F.3d 146; § 33:1-10(2b) (providing language with the same effect). The difference between the two subsections of this statute pertains to the type of license that the producer holds: a plenary winery license (2a) or a farm winery license (2b). *See id.* (discussing different privileges that extend to separate licenses).

107. *See Freeman*, 629 F.3d at 159-61 (addressing second discriminatory aspect of New Jersey statute).

108. *Id.* at 159 (rejecting defendants' claim that New Jersey laws did not discriminate). In rejecting the defendants' argument, the court distinguished *Cherry Hill Vineyard, LLC v. Baldacci*. *See id.* (stating *Baldacci* does not support defendants' argument). The court stated that *Baldacci* actually supports the Third Circuit's analysis, contrary to the position of the defendants, because the Maine laws at issue in *Baldacci* treated in- and out-of-state wineries equally. *See id.* ("*Baldacci* supports our view that the direct-sale provisions of the ABC Law are facially discriminatory.").

109. *See id.* ("Instate wineries are thereby allowed to skip the first two tiers—wholesalers and retailers—while out-of-state wineries must involve both of these tiers in order for their wine to reach consumers.").

110. *See id.* (noting that laws are subject to strict scrutiny because of their facially discriminatory nature).

111. *See id.* at 160-61 (introducing analysis of personal importation and reciprocity laws).

personally imported into New Jersey from other states.[112] As an exception to the general rule, the statute permitted a transporting individual to obtain and pay for a permit.[113] The court held that these requirements specifically burdened interstate commerce.[114] Applying strict scrutiny, the court held that the personal importation law violated the dormant Commerce Clause.[115]

In similar fashion, the court found that the reciprocity provision also violated the dormant Commerce Clause.[116] Section 33:1-2(a) prohibited individuals from importing wine into New Jersey from an outside state, unless the outside state also allowed New Jersey wines to be imported in the same manner.[117] The court refused to entertain the defendants' argument that the law did not pertain to wine imported for *personal* use.[118] Furthermore, the court found the law to be facially discriminatory because it allowed in-state wine to bypass portions of the three-tier system, whereas out-of-state wine could not.[119] Finally, it noted that the reciprocity provision "'risk[ed] generating the trade rivalries and animosities, the alliances

112. *See id.* at 160 (discussing one-gallon cap on importation of out-of-state wine); *see also*, N.J. STAT. ANN. § 33:1-2(a) (West 2008) ("Alcoholic beverages intended in good faith solely for personal use may be transported, by the owner thereof, in a vehicle other than that of the holder of a transportation license, from a point outside this State to the extent of, not exceeding . . . one gallon of wine . . . ."), *invalidated by Freeman*, 629 F.3d 146.

113. *See Freeman*, 629 F.3d at 160-61 (discussing permit that allows wine in excess of one gallon to be imported into state).

114. *See id.* at 160 ("Specifically, the requirements that any individual seeking to enter New Jersey with a greater amount of wine (1) apply for a special permit, and (2) pay a fee for the permit, directly burden interstate, but not intrastate, commerce."). The court rejected the argument by defendants that the provision served local purposes—taxation tracking and underage alcohol activities—that could not be attained through non-discriminatory means. *See id.* (noting state's argument). The court determined that no evidence existed in the record that supported this argument, and that the district court lacked authority to raise the issues *sua sponte*. *See id.* (explaining district court's error).

115. *See id.* at 160-61 (holding permit requirement violated dormant Commerce Clause).

116. *See id.* at 161 ("The reciprocity provision of § 33:1-2(a) also facially discriminates against interstate commerce.").

117. *See* N.J. STAT. ANN. § 33:1-2(a) ("[N]o person shall transport into this State or receive from without this State into this State, alcoholic beverages where the alcoholic beverages are transported or received from a state which prohibits the transportation into that state of alcoholic beverages purchased or otherwise obtained in the State of New Jersey.").

118. *See Freeman*, 629 F.3d at 162 ("[T]he provision cannot be read to contain an exception allowing importation for personal use, because to imply that exception would read the reciprocity clause out of the statute entirely.").

119. *See id.* at 161-62 (noting unequal treatment of in- and out-of-state wineries with respect to three-tier system).

and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.'"[120]

3. *The Direct Shipment Ban Survives*

New Jersey's ban on the direct shipment of wine withstood dormant Commerce Clause challenge.[121] The plaintiffs argued that the law was discriminatory in its effect because several out-of-state wineries only sold their wine through direct shipments, as routing wine through a wholesaler was not cost-effective.[122] The court, however, found that the Commerce Clause does not place an obligation upon New Jersey to cater to the individual business practices of out-of-state wineries.[123] Moreover, the court determined that the plaintiffs could not adequately show that New Jersey's nondiscriminatory application of the direct shipment ban harmed interstate commerce by favoring intrastate commerce.[124] The court noted that the plaintiffs did not argue that the "'burdens on interstate commerce substantially outweigh[ed] the putative local benefits'" (the *Pike* balancing test), and therefore upheld its constitutionality.[125]

IV. DORMANT COMMERCE CLAUSE CONNOISSEURS DELIGHT IN THIRD CIRCUIT'S TREATMENT

In *Freeman*, the Third Circuit held that the dormant Commerce Clause stood its ground with respect to alcohol law challenges.[126] That position, however, is notably different than that of some of its circuit coun-

120. *Id.* at 161 (quoting Granholm v. Heald, 544 U.S. 460, 473 (2005)) (finding New Jersey statute to be directly at odds with what Commerce Clause was designed to prevent).

121. *See id.* at 164 ("[W]e reject [the plaintiffs'] challenge to the direct shipping ban and affirm the District Court's opinion insofar as it held that ban to be constitutional.").

122. *See id.* at 162-63 (arguing direct shipment ban discriminated in its effect because some wineries only sell wine via direct shipment).

123. *See id.* at 163 (rejecting plaintiffs' argument that law was discriminatory in its effect). The court referenced a 1999 Third Circuit opinion that held that market structure and methods of operation of a business do not burden the Commerce Clause. *See id.* at 162-63 (recognizing that "'questions of the market's "structure" and its "method of operation" are quite simply beyond the concern of the Commerce Clause'" (quoting A.S. Goldmen & Co. v. N.J. Bureau of Secs., 163 F.3d 780, 787 (3d Cir. 1999))).

124. *See id.* at 163 (acknowledging plaintiffs' failure to show direct link between New Jersey law and burden on interstate commerce).

125. *Id.* at 157-58 (quoting Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 239, 258 (3d Cir. 2006)) (discussing *Pike* balancing test); *see also id.* at 164 (noting that plaintiffs neglected to argue in alternative that direct shipment ban failed *Pike* balancing test).

126. *See id.* at 164-65 ("[W]e . . . reverse the District Court's determination that the direct sales and importation provisions of New Jersey law comport with the dictates of the dormant Commerce Clause . . . .").

terparts.[127] This Part will examine the Third Circuit's dormant Commerce Clause analysis, focusing on how it differs from that of other circuit courts—namely, the Fifth Circuit in *Steen*.[128] Next, this Part will offer advice for practitioners wishing to challenge outstanding wine laws, specifically addressing why the Third Circuit is the forum of choice for such suits.[129] Finally, this Part will discuss possible arguments for wine law defenders.[130]

A. *A Critical Analysis of* Freeman

The Third Circuit began its analysis in *Freeman* by focusing on the dormant Commerce Clause, unlike the court in *Steen*, which focused on the "unquestionably legitimate" three-tier system.[131] The distinction between how these two starting points cannot be overstated, for it is what drove the difference in the outcomes of *Freeman* and *Steen*.[132] The Fifth Circuit's analysis focused on the text of the Twenty-first Amendment—granting states the power to regulate alcohol shipment across state lines—especially in relation to the "unquestionably legitimate" language in *Granholm* and *North Dakota*.[133] In sharp contrast, the Third Circuit placed the dormant Commerce Clause beyond the reach of the Twenty-first Amendment by acknowledging, through *Granholm*'s precedential holding

127. *See, e.g.*, Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010) (holding local deliveries of alcohol by in-state, but not out-of-state, retailers does not violate dormant Commerce Clause); Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009) (holding direct shipment of alcohol by in-state retailers did not violate dormant Commerce Clause); Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1st Cir. 2007) (holding that Maine statute allowing in-state wineries to by-pass wholesalers and sell directly to consumers did not violate dormant Commerce Clause); Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) (holding personal importation exceptions do not violate dormant Commerce Clause).

128. For a discussion of the Third Circuit's dormant Commerce Clause analysis, see *infra* notes 131-37 and accompanying text.

129. Advice for practitioners who may challenge wine laws in the Third Circuit may be found *infra* notes 138-46 and accompanying text.

130. For a discussion of possible arguments in defense of state wine laws, see *infra* notes 147-53 and accompanying text.

131. *See Freeman*, 629 F.3d at 157 (noting that proper analysis of alcohol law challenges is to be conducted through prism of Commerce Clause); *see also Steen*, 612 F.3d at 820-21 (discussing court's reliance on three-tier system being legitimate).

132. *See generally* Mike Figge, Note, *Constitutional Law—Challenging Anti-commerce State Regulatory Schemes in Light of the Supreme Court's Admonition of Protectionist Alcohol Regulations;* Granholm v. Heald, *544 U.S. 460 (2005)*, 8 WYO. L. REV. 231, 249-58 (2008) (discussing difficulties in application of Supreme Court's *Granholm* holding due to tension between dormant Commerce Clause analysis and "unquestionably legitimate" description of three-tier system).

133. *See Steen*, 612 F.3d at 818 ("When analyzing what else is invalid under the Supreme Court's *Granholm* reasoning, we find direction in a source for some of the Court's language. The Court quoted a 1986 precedent that North Dakota's three-tier system was 'unquestionably legitimate.'" (quoting Granholm v. Heald, 544 U.S. 460 (2005))).

that "dormant Commerce Clause principles apply in the context of regulations on the shipment of wine."[134]

The dormant Commerce Clause prohibits states from forming economic trade barriers, irrespective of the good being sold.[135] The Third Circuit's emphasis of this point, buttressed by the support of the Supreme Court's acknowledgement in *Granholm* that any laws that discriminate against interstate commerce are invalid in "all but the narrowest of circumstances," is the decisive difference between *Freeman* and *Steen*.[136] The *Freeman* court is clear in its position that economic discrimination is allowable *only* when a state meets the sufficient criteria of a legitimate local purpose that could not be achieved through non-discriminatory means.[137] Similarly, the Third Circuit does not distort the *Granholm* precedent by limiting it to alcohol producers; economic discrimination may occur at any level of the three-tier system.[138] The Third Circuit rooted its analysis in the principles of the dormant Commerce Clause—protection of economic freedom—without overextending the reach of the Twenty-first Amendment, which was the notable error in *Steen*.[139]

It may be possible, however, to reconcile the outcome in *Steen* by way of the Third Circuit's analysis in *Freeman*. In *Steen*, the court focused on

134. *Freeman*, 629 F.3d at 158 (noting that dormant Commerce Clause applies to alcohol regulation).

135. *See Granholm*, 544 U.S. at 486-87 (noting that § 2 of Twenty-first Amendment does not save laws of other constitutional provisions, nor does it abrogate Congress's Commerce Clause power). *But see* Harris Danow, Recent Development, *History Turned "Sideways":* Granholm v. Heald *and the Twenty-first Amendment*, 23 CARDOZO ARTS & ENT. L.J. 761, 768-69 (2006) (arguing that history behind Twenty-first Amendment makes it clear that "alcohol was not to be regarded as just another ordinary article of commerce"). For an interesting discussion on the history of the dormant Commerce Clause's application to alcohol laws, and an argument that except for Prohibition, courts have always treated alcohol like any other good under the Commerce Clause, see Figge, *supra* note 132, at 235-43 (arguing that Commerce Clause pendulum is swinging back in favor of holding alcohol laws unconstitutional).

136. *Granholm*, 544 U.S. at 472 (noting that state laws almost always violate Commerce Clause if laws benefit in-state economic interests over out-of-state interests).

137. *See Freeman*, 629 F.3d at 158 (stating that if plaintiff shows challenged law to be discriminatory, "'the State must demonstrate (1) that the statute serves a legitimate local interest, and (2) that this purpose could not be served as well by available nondiscriminatory means'" (quoting Am. Trucking Ass'n v. Whitman, 437 F.3d 313, 319 (3d Cir. 2006))). This is consistent with Supreme Court precedent, which uses the same test to determine whether an economically discriminatory law may still be constitutional. *See Granholm*, 544 U.S. at 489 (completing analysis of Michigan and New York laws to determine constitutionality).

138. *See Freeman*, 629 F.3d at 160 (implying that economic discrimination could occur at wholesaler level via purchase of wholesaler permits by out-of-state wineries due to discriminatory permit fee and continued subjection to three-tier system).

139. *See generally* Rotter & Stambaugh, *supra* note 31, at 648-49 (discussing detrimental effect of relying on Twenty-first Amendment for justification in discriminatory state alcohol laws).

the legitimacy of the three-tier system via *Granholm*'s "unquestionably legitimate" language.[140] By applying more of a dormant Commerce Clause-centric analysis, the Fifth Circuit could have emphasized the non-discriminatory nature of the Texas law with respect to its treatment of alcohol passing through the three-tier system.[141] This reasoning abandons a heavy reliance on the "unquestionably legitimate" reasoning, and instead grounds its analysis in a constitutional blend: respect for states' rights under the Twenty-first Amendment through the lens of the dormant Commerce Clause.[142] Of course, a challenger's next step would be to attack the final discriminatory stage of the delivery process, which is exactly why *Steen* was on petition to the Supreme Court.[143]

B. *A Practitioner's Guide to Wine Suits in the Third Circuit*

1. *Advice for the Wine Law Challenger: Get into* Pike

For practitioners wishing to challenge alcohol laws, there may be no better forum in which to bring a suit than the Third Circuit. In *Freeman*, the Third Circuit addressed for the first time whether plaintiffs have prudential standing if they are not directly regulated by the challenged statute.[144] The court held that such a class of plaintiffs do have prudential standing "if their 'ability to freely contract with out-of-state companies [is] directly infringed by local regulation.'"[145] This position, in effect, throws open the courthouse doors to plaintiffs indirectly injured through their inability to contract with alcohol producers directly regulated by state

140. *See* Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 819 (5th Cir. 2010) ("[T]he foundation on which we build is that Texas may have a three-tier system."); *see also* Petition for Writ of Certiorari, *supra* note 71, at 11-12 ("[T]he court did not apply the Commerce clause 'differently' in this case; it did not apply the Commerce Clause *at all.* The court sought to justify this approach by invoking *Granholm*'s observation that 'the three-tier system is "unquestionably legitimate."'" (quoting *Granholm*, 544 U.S. at 489)).

141. *Cf. Freeman*, 629 F.3d at 158-64 (applying dormant Commerce Clause analysis in determining constitutionality of New Jersey law).

142. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) (discussing relationship between Twenty-first Amendment and Commerce Clause). In explaining this relationship, the Supreme Court stated, "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other . . . ." *Id.*

143. *See* Petition for Writ of Certiorari, *supra* note 71, at 19 (discussing direct shipment of alcohol by Texas retailers), *cert. denied*, 131 S. Ct. 1602 (2011).

144. *See Freeman*, 629 F.3d at 156-57 (noting that Third Circuit has never answered question of whether plaintiffs have prudential standing when not directly regulated by statute).

145. *Id.* at 157 (quoting Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery Cnty., 271 F.3d 140, 149 (3d Cir. 2001)) (Barry, J., dissenting). The court noted that it was adopting the rule out of the interest that the plaintiffs had in "vindicat[ing] interests related to the protection of interstate commerce." *Id.*

laws.[146] Although not the only circuit to find prudential standing in such a scenario, the Third Circuit's standing position, coupled with its dormant Commerce Clause application to wine challenges, does make it an ideal forum for alcohol law challengers.[147]

Besides grounding any alcohol law challenge in the Commerce Clause, practitioners would also be wise to argue in the alternative that challenged laws, even if not discriminatory, fail the *Pike* balancing test.[148] This is particularly important for direct shipment ban challenges.[149] Because current direct shipment bans are largely facially nondiscriminatory—meaning they apply to both in- and out-of-state suppliers evenhandedly—there is not a convenient "exception to the three-tier system" argument that will elevate the ban into a strict scrutiny category.[150] Therefore, practitioners bringing such a challenge must provide *concrete*

146. *See generally* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 251-53 (1988) (discussing prudential standing as applied by federal courts). As Professor Fletcher explains, courts use prudential standing to determine whether a plaintiff has a recognizable cause of action. *See id.* (noting function of prudential standing among courts). Therefore, expanding prudential standing to a class of plaintiffs not directly, but indirectly, injured through a relationship with a third party will allow more litigation to reach the merits of the case. *See id.* at 246 (discussing third-party standing cases).

147. *See, e.g.*, Huish Detergents, Inc. v. Warren Cnty., 214 F.3d 707, 710-12 (6th Cir. 2000) (finding plaintiff met requirement for prudential standing in contracting with affected third party). *But see* Ben Oehrleins & Sons and Daughter, Inc. v. Hennepin Cnty., 115 F.3d 1372, 1381 (8th Cir. 1997) (finding no prudential standing for generators of waste who incurred higher removal costs due to county ordinance that increased cost of waste removal hauling company).

148. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating test used to determine whether nondiscriminatory statute impermissibly burdens interstate commerce). In *Pike*, Justice Stewart stated what is now known as the "*Pike* balancing test":

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citations omitted).

149. *See Freeman*, 629 F.3d at 164 (noting failure to argue *Pike* balancing test with respect to New Jersey's direct shipment ban). Specifically, the *Freeman* court noted: "Because plaintiffs do not argue in the alternative that the direct shipping ban fails the balancing test of *Pike v. Bruce Church, Inc.*, we reject their challenge to the direct shipping ban and affirm the District Court's opinion insofar as it held that ban to be constitutional." *Id.* (citation omitted).

150. *See* Ohlhausen & Luib, *supra* note 48, at 512-16 (discussing response by states with discriminatory wine laws in wake of *Granholm* ruling); *see also id.* at 526-27 (discussing availability of *Pike* balancing test argument in challenging nondiscriminatory alcohol laws).

evidence that the challenged *state law* places "burdens on interstate commerce [that] substantially outweigh[ ] the putative local benefits."[151] As the court hinted in *Freeman*, the *Pike* balancing test argument may very well be the chink in the armor of the direct shipment ban and other existing alcohol laws.[152]

2. *Advice to Defenders: Embrace the Legitimate Local Purpose*

The defendants in *Freeman* missed an opportunity to "save the provisions of the ABC law" by failing to provide an argument that the regulations served a legitimate local purpose.[153] Although this is not an easy argument to make, as Supreme Court and circuit court precedent both demonstrate, it is worth exploring.[154] The "legitimate local purpose" argument failed throughout the courts in its previous attempts because defendants failed to show a concrete correlation between the law and the local purpose it served.[155] More correlative evidence could possibly remedy that defect.[156] Furthermore, a watchful eye should be kept on the other circuits and how they treat the "unquestionably legitimate" rationale expressed in *Steen*.[157] Should that gain traction amongst the circuits, a different Third Circuit bench could lend that argument more

151. *Freeman*, 629 F.3d at 157-58 (discussing purpose of applying *Pike* balancing test when plaintiff does not show that challenged law is discriminatory (quoting Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 258 (3d Cir. 2006))).

152. *See id.* at 164 (noting no *Pike* argument was made).

153. *Id.* at 160 (noting that defendants did not argue that provisions of ABC law were necessary to serve legitimate local purpose). Further in its analysis, the court noted that the defendants also failed to argue a legitimate local purpose for the reciprocity provision. *See id.* at 162 ("[N]o party has provided us with any argument that the reciprocity provision is necessary to effectuate some legitimate local interest.").

154. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 489-93 (2005) (rejecting states' arguments that laws served legitimate local purpose in preventing underage drinking and fostering tax accountability); Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 17 n.23 (1st Cir. 2010) (rejecting Massachusetts' claim that state law served state law served local purposes of "benefitting small wineries, supporting the three-tier system, and increasing consumer choice"); Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 433-34 (6th Cir. 2008) (rejecting defendants' argument that Kentucky laws were necessary to police underage drinking and to account for tax revenue).

155. *See Granholm*, 544 U.S. at 492-93 ("The Court has upheld state regulations that discriminate against interstate commerce only after finding, *based on concrete record evidence*, that a State's nondiscriminatory alternatives will prove unworkable." (emphasis added) (citation omitted)).

156. *See id.* at 492 ("Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.").

157. *See* Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 818-21 (5th Cir. 2010) (holding Texas law constitutional due to state's unquestionably legitimate three-tier system). For a discussion of other circuit courts that have upheld the "unquestionably legitimate" argument in favor of state laws surviving a dormant Commerce Clause challenge, see *supra* notes 63-75 and accompanying text.

credence.[158] Finally, there is always a remedy to such challenges through the dormant Commerce Clause "exception"—congressional approval to discriminate in interstate commerce—an option currently proposed by some elected representatives, albeit without much success.[159]

V. NEW JERSEY'S HARVEST: WHAT LIES AHEAD?

So what does the future hold for New Jersey wineries?[160] The Third Circuit remanded *Freeman* to the district court for a remedy, which has many New Jersey wineries concerned that the court could mandate that in-state wineries cease selling wine directly to consumers.[161] The District Court should, and probably will, find this option undesirable, as it will impede current state economic conditions.[162] In fact, a bill is currently being drafted that would allow both in- and out-of-state wineries to ship

158. *See Freeman*, 629 F.3d at 151 (noting case was heard before a three-judge panel).

159. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946) (explaining that state may engage in discriminatory economic regulation if Congress has "expressly stated its intent and policy" to allow state to do so). In a later case, Justice White explained the rationale behind allowing a state to engage in interstate economic discrimination when he stated:

> On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) (explaining exception to dormant Commerce Clause); *see also* Robert Taylor, *Congress Holds Hearing on Bill Threatening Wine Direct Shipping*, WINE SPECTATOR, Sep. 30, 2010, http://www.winespectator.com/webfeature/show/id/43670 (discussing Congressional hearing on H.R. 5034 proposal that would return greater power to states to regulate alcohol).

160. For a discussion of the future for New Jersey wineries, see *infra* notes 161-64 and accompanying text.

161. *See Freeman*, 629 F.3d at 164 (discussing possible remedies and ultimately remanding case to district court for determination); *see also* Editorial, *New Jersey's Wine Industry / Could It Dry Up?*, PRESS OF ATLANTIC CITY, Feb. 3, 2011, (discussing concern in New Jersey that court could order wineries to cease selling to consumers); Paul Nussbaum, *Wineries in N.J. Say Court May Sour Sales*, PHILA. INQUIRER, Jan. 30, 2011, *available at* http://articles.philly.com/2011-01-30/news/27091304_1_direct-shipping-discriminates-against-out-of-state-wineries-new-jersey-legislature (discussing ramifications if district court chooses to ban direct sales by New Jersey wineries).

162. *See* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 792 (2010) (arguing that courts, when faced with decision of expansion or contraction of benefit for remedy, should favor "a national-market norm"). Professor Walsh, in his article, proposed a scenario very similar to the situation that existed in *Freeman*. *See id.* at 791 (describing state system that allowed in-state wineries to ship directly to customers, but required out-of-state wineries to pass product through wholesalers). Professor Walsh argues that in such a situation, the remedy a court should choose would be to expand the direct-shipping benefit instead, favoring the economic system, than look to the "unexpressed legislative purpose" of a state

directly to customers.[163] Despite the cloudy final disposition for New Jersey wineries, one thing remains clear: as the *Freeman* decision decants, the tannins that have preserved the dormant Commerce Clause's prowess in the Third Circuit have given wine enthusiasts reason to toast, as direct-shipping restrictions now appear ripe for a challenge.[164]

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legislature. *Id.* at 791 (explaining national-market constitutional norm application to direct-shipping scenario).

163. *See* Robert Taylor, *Direct Shipping Coming Soon to New Jersey?*, WINE SPECTATOR, Jan. 18, 2011, http://www.winespectator.com/webfeature/show/id/44362 ("*Wine Spectator* has learned that local wineries are working with state legislators to craft a bill that would allow shipping by both in-state and out-of-state wineries.").

164. *See id.* ("To save the [New Jersey] satellite tasting rooms—and the New Jersey wine industry itself—members of the Garden State Wine Growers Association have banded together to propose a remedy: Legalize [sic] direct shipping.").